IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10799 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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AMARSING ABHESING WAGHELA

Versus

GSRTC

Appearance:

1. Special Civil Application No. 10799 of 1996

MR JS BRAHMBHATT for Petitioner No. 1

MR HS MUNSHAW for Respondent No. 1

NOTICE SERVED BY DS for Respondent No. 2

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 03/04/2002

ORAL JUDGEMENT

Heard learned advocate Mr. Brahmbhatt for the petitioner and Mr. Munshaw for the respondent corporation. By way of this petition, the petitioner

workman has challenged the order of termination dated 13.3.1996 passed by the Divisional Controller, ST, Baroda. This petition was admitted by this Court by issuing rule thereon and it was made returnable on 18th June, 1997 by order dated 5th May, 1997. Brief facts of the present petition are to the effect that the petitioner was working as a driver selected by the corporation and thereafter was appointed as badli workman by order dated 24.4.1986 and thereafter he was appointed as daily rated employee on 30thJune, 1987 and thereafter he was taken on time scale on 10.9.1988. Thereafter, the petitioner was working with the corporation continuously as a permanent employee of the corporation. The Corporation has for the first time on 24th July, 1987, send the petitioner for medical examination wherein the case of the petitioner was referred to the Board of Referee and according to the medical certificate given by the said Board, he was declared temporary fit for a period of one year and thereafter, he has again been sent for medical examination after one year to the Civil Surgeon Baroda and then referred to the Board of Referee wherein on 21st June, 1989 he was again declared temporary fit for one year and thereafter on 9th November, 1995 he was sent for medical examination and his case was again referred to the Board of Referee and thereafter, the Board of Referee has given opinion that the petitioner is not having clear vision and, therefore, he has been considered unfit for the post of driver and for other post, he has been considered fit and, thereafter, considering the certificate issued by the civil surgeon on 13th February, 1996 which is at page 21, his services were terminated by the Divisional Controller on 13th March, 1996 which is under challenge in this petition.

During the course of hearing, learned advocate Mr. Brahmbhatt has submitted that there was settlement between the corporation and the recognized union dated 26th February, 1971 and item No.2 of Schedule II to the said settlement provide at the time of appointment of any employee in the corporation, medical examination is required to be carried out immediately and if any employee has been appointed on daily wage or monthly wages, then, same is required to be carried out within six months from the date of the first appointment.In the said settlement it has been made clear that for the post of driver, medical examination in respect of visual activity test procedure, and in case if any person has been in employment send for medical examination and if ultimately he has been declared unfit for the work which has been performed by him, then, the corporation shall

have to employ such employee for other post and in such event, his service cannot be terminated and while offering him alternative posting, at that time whatever basic salary received by such workman will not be reduced and same shall be protected by the corporation. Relying upon the said settlement, learned advocate Mr. Brahmbhatt has submitted that the petitioner is entitled for alternative employment when he has been declared unfit for the post of driver and, therefore, instead of terminating his services, he ought to have been offered alternative employment while protecting his services and salary received by him. He has further submitted that before approaching this court, legal notice dated 16th April, 1996 was served upon the corporation and reply dated 25th April, 1996 was received by the petitioner from the corporation that according to the settlement dated 26th February, 1971, Schedule II, Item NO.2, benefit of recategorization cannot be given to the petitioner and, therefore, they rejected the claim made by the petitioner. In support of his submissions, he has relied upon the decision of this Court [Coram : M.R. Calla, J.] dated 10th October, 1995 in case of Brijesh Chanderlal Yadav versus GSRTC Ahmedabad in Special Civil Application No. 145 of 1995.

As against that, learned advocate Mr. Munshaw appearing for the respondent corporation has submitted that the petitioner was initially examined by the Medical Board and thereafter the matter was referred to the Board of Referee and on both the occasions, he was declared temporary fit by the Board of Referee for a period of one year since he was working as temporary on daily wage basis with the corporation. Thereafter, the petitioner was sent for medical examination in the year 1995 and before the Medical Board, the matter was referred to the Board of Referee and ultimately by medical certificate dated 13.2.1996, he was declared unfit and, therefore, his services were rightly terminated by the corporation as there is no provision for recategorization of such an employee who has been declared unfit by the Board of Referee and, therefore, order of termination passed by the corporation is legal and valid order and, therefore, this Court should not interfere with such order.

I have considered the submissions made by the learned advocates for both the sides. It is necessary to note one decision of the apex court in case of Tandon Brothers versus State of West Bengal and others reported in 2001 (5) SCC 664. Relevant observations made by the apex court in the middle of para 34 of the said decision are reproduced as under:

"... Governmental action must be based on utmost good faith, belief and ought to be supported with reason on the basis of the state of law - if the action is otherwise or runs counter to the same, the action cannot but be ascribed to be mala fide and it would be a plain exercise of judicial power to countenance such action and set the same aside for the purpose of equity, good conscience and justice. Justice of the situation demands action clothed with bona fide reason and necessities of the situation in accordance with the law. But if the same runs counter, law courts would not be in a position to countenance the same."

It is also necessary to note some of the observations made by the apex court in recent decision in case of M.S. Garewal and another versus Deep Chand Sood and others reported in (2001) 8 SCC 151. In para 27 and 28 of the said decision, the apex court has observed as under:

"27. The decision of this Court in D.K. Basu versus State of W.B. comes next. This decision has opened up a new vista in the jurisprudence of the country. The old doctrine of only relegating the aggrieved to the remedies available in civil law limits stands extended since Anand,J. (as His Lordship then was) in no uncertain terms observed; (SCC p. 439 para 45)

'The Courts have the obligations to satisfy the social aspirations of the citizens because the Courts and the law are for the people and expected to respond to their aspirations. A Court of law cannot close its consciousness and aliveness to stark realities. Mere punishment of the offender cannot give much solace to the family of the victim civil action for damages is a long drawn and a cumbersome judicial process. Monetary compensation for redressal by the court finding the infringement of the indefeasible right to the life of the citizen is, therefore, useful and at times perhaps the only effective remedy

to apply balm to the wounds of the family members of the deceased victim, who may have been the breadwinner of the family.'

28. Currently, judicial attitude has taken a shift from the old draconian concept and the traditional jurisprudential system - affection of the people has been taken note of rather seriously and the judicial concern thus stands on a footing to provide expeditious relief to an individual when needed rather than taking recourse to the old conservative doctrine of the civil court's obligation to award damages. As a matter of fact, the decision in D.K. Basu has not only dealt with the issue in a manner apposite to the social need of the country but the learned Judge with his usual felicity of expression firmly established the current trend of justice oriented approach. Law courts will lose their efficacy if they cannot possibly respond to the need of the society technicalities there might be many but the justice oriented approach ought not to be thwarted on the basis of such technicality since technicality cannot and ought not to outweigh the course of justice."

In case of G.B.Pant University of Agriculture and
In case of G.B.Pant University of Agriculture and
Technology versus State of UP and others, reported in 2000 AIR SCW 2870, the apex court while considering the question of regularization, has observed as under in para 10 of the said judgment:

"10. Admittedly, Cafeteria employees need succour for livelihood - would they continue to remain half fed and half clad as long as they live - is this is the society that we feel proud of : Is this the guarantee provided by the founding fathers of our Constitution or is this the guarantee provided by the founding fathers of our Constitution or is this the concept of socialism which they conceived ? None of the answers can possibly be in the affirmative. The situation is rather awesome and deplorable - The University by compulsion directs students to be residents of hostel with a definite ban on having food from outside agencies excepting under special circumstances and the provider of food, namely the staff of the Cafeteria ought not to be treated as an employee of the University - whose employees they are if we may ask and we think it

> would not be impertinent on our part to ask the same - is it the consumer of food ? Since when the consumer of food becomes the employer ? These are the questions which remain unanswered; The society shall have to prosper and this prosperity can only come in the event of there being a wider vision for total social good and benefit; It is not bestowing any favour to anybody but it is a mandatory obligation to see that the society thrives. The deprivation of the weaker section we had for long but time has now come to cry halt and it is for the law courts to rise up the occasion and grant relief to a seeker of a just cause and just grievance. Economic justice is not a mere legal jargon but in the new millennium it is the obligation for all to confer this economic justice to a seeker. Society is to remain, social justice is the order and economic justice is the rule of the day. Narrow pedantic approach to statutory documents no longer survives. The principle of corporate jurisprudence is now being imbibed on to industrial jurisprudence and there is a long catena of cases in regard thereto - the law thus is not in a state of fluidity since the situation is more or less settled. As regards interpretation widest possible amplitude shall have to be offered in the matter of interpretation of statutory documents under industrial jurisprudence. The draconian concept is no longer available. Justice - social and economic, as noticed above ought to be made available with utmost expedition so that the socialistic pattern of the society as dreamt by the founding fathers can thrive and have its foundation so that the future generation do not live in the dark and cry for social and economic justice. "

In view of the observations made by the apex court and also considering the factual aspect of this matter, it is necessary to note that the driver was appointed after selection as a badli workman and, thereafter, he was appointed as daily rated employee and subsequently he was taken on time scale on 10th September, 1988 and during this period, admittedly, medical examination was undertaken twice by the corporation and he was declared medically fit on both the occasions and, thereafter he continued for a period of more than seven to eight years and he was continued without any medical examination in service and ultimately

the corporation has sent the workman for medical examination by letter dated 9th November, 1995. Letter has been addressed to the petitioner by the Divisional Controller of the corporation on 23rd November, 1995 and 23rd December, 1995. Initially, he was sent examination to the medical board and thereafter, his case was referred to the board and ultimately the board of referee issued certificate dated 13th February, 1996 declaring him unfit permanently for the post of driver and he has been considered for being appointed on some other post and that is how the termination order has been passed. Therefore, considering this aspect, it was not the first medical examination from the date of appointment carried out by the respondent corporation. According to the policy of the corporation, medical examination is required to be completed within six months from the date of initial appointment which has not been carried out by the corporation, though on two occasions, it was carried out but it was temporary examination. So, the petitioner was remaining in service from 1986 to 1996 for a period of about ten years and thereafter, his services were terminated in view of the fact that he has been declared permanently unfit for the post of driver. In such a situation, it is necessary to be considered whether such termination on the ground of medical unfit is proper or not. In this case, the moment, the petitioner was found to be unfit for the post in question, his services has been terminated and he has been sent home like an animal who is being sent to the slaughter house the moment it is found to be useless. Such type of approach on the part of the corporation which is a State within the meaning of Article 12 of the Constitution of India cannot be tolerated. This aspect has been considered and examined by the apex court in number of cases, some of which are as under :

(1) Narendra Kumar Chandla versus State of Haryana and Others reported in AIR 1978 SC 519.
(2) State Bank of India versus G.K. Deshak, reported in 1994 SCC Lab & Service 410.

In case of Narendra Kumar Chandra v. State of Haryana and others reported in AIR 1995 SC 519, the apex court has considered the same situation. The apex court has considered the physical disablement of an employee while working with the employer. Relevant observations made by the apex court in paragraph 7 of the judgment are reproduced as under :

"7. Article 21 protects the right to livelihood as an integral facet of right to life.

When an employee is afflicted with with unfortunate disease due to which, when he is unable to perform the duties of the posts he was holding, the employer must make every endeavour to adjust him in a post in which the coemployee would be suitable to discharge the duties as a Carrier Attendant is unjust. Since he is a matriculate, he is eligible for the post of LDC. For LDC, apart from matriculation, passing in typing test either in Hindi or English at the speed of 15/30 words per minute is necessary. For a clerk, typing generally is not a must. In view of the facts and circumstances of this case, we direct the respondent board to relax his passing of typing test and to appoint him as a LDC. Admittedly on the date when he had unfortunate operation, he was drawing the salary in the pay scale of Rs.1400-2300. Necessarily, therefore, his last drawn pay has to be protected. Since he has been rehabilitated in the post of LDC we direct the respondent to appoint him to the post of LDC protecting his scale of pay of Rs.1400-2300 and direct to pay all the arrears of salary. "

In case of State Bank of India versus G.K. Deshak, reported in 1994 SCC Lab & Service 410, the apex court has observed as under in para 3 and 4 :

"3. We have heard the learned counsel for the parties at length. The medical opinion, which is on the records of the case, clearly indicates that the defect in his eyes is very serious and he is unfit for the post,. He was allowed to join in obedience to the writ issued by the High Court. The reasons given in the impugned judgment indicate that the High Court took upon itself to decide the question of medical fitness of the respondent and on reading a conclusion in favour of the respondent, preferred the same as against the medical opinion of the specialist doctor, It is significant to note that it is not suggested on behalf of the respondent that the authorities of the appellant State Bank of India have acted mala fide or with any malice against the respondent. In the circumstances, we do not approve the approach adopted by the High Court in allowing the writ petition.

4. However, on behalf of the appellant State

Bank, it has been stated that since the respondent has been in the service of the bank for a number of years, and may be rendered unemployed if his services are terminated, the appellant is prepared to retain him in service on humanitarian grounds and fix him up in some other post with pay protection. It has been made clear by the learned counsel for the appellant that by this concession, the respondent shall not be entitled to claim for being permanently absorbed in the post or a right of promotion, and the appellant should have the right to get him medically re-examined after some time to find out whether he is able to discharge the duties of the new post or not. Similarly, the question of promotion also will be within the discretion of the Bank authorities, to be exercised fairly in accordance with the rules. We think that the attitude taken on behalf of the State Bank is reasonable and accordingly, we set aside the impugned order and direct the appellant State Bank to appoint the respondent in any other appropriate post subject to the conditions stated by the appellant and mentioned above. The appeal is accordingly disposed of in the above terms. There will be no order as to costs."

Recently, this court has also considered this aspect in case of Manubhai Somnath Joshi versus GSTRC & Anr. reported in 2001 (1) GLR 184. Relying upon the decision of the apex court as well as the unreported decision of this court, this court has observed as under in para 4 of the judgment which are reproduced as under:

"4. It is the case of the petitioner that according to the policy of the respondent corporation, if any employee of the corporation is declared unfit for the post on which he is working and if he is fit for an alternative post or a lower post, then, his case is required to be considered. On behalf of the petitioner, reliance is placed on the judgment and order of this Court (Coram : K.R. Vyas,J.) in special civil application no. 8821 of 1997 dated 24.4.1998, in the matter between Chaudhary Haribhai Sendhabhai v. Chairman and Managing Director, G.S.R.T.C. & Anr., Mr.Upadhyay invited attention of this Court to para 3 of the said decision, which reads as under:

'This Court had an occasion to consider the said letter No. 547 dated 26.1.1976, as well as the GSO No. 503 which also deal with re-categorization in SCA No. 6947 of 1994 decided on 28.4.1998. There was also a case of a driver who was declared unfit on medical certificate and consequently his services were terminated by the corporation by order of termination dated 24.11.1995. In the said judgment after relying upon decision of the Supreme Court in the case of Narendrakumar Chandla v. State of Hyderabad & Ors. reported in AIR 1995 SC 519, held that when an employee is afflicted with unfortunate deceased (disease) due to which, he is unable to perform the duties to the posts he was holding, the employer must make every endeavour to adjust him in a post in which the employee would be suitable to discharge the duties and accordingly held that the respondents were not justified in rejecting the request of the petitioner to the post as a helper or peon. The petition was accordingly allowed. Since the fact of the present case is almost identical, same order is required to be passed in this petition.'

Mr. Prabhakar Upadhyay, the learned counsel for the petitioner submitted that in view of the similarity in the facts of both the cases a similar order is required to be passed in this petition also. He has also submitted that the aforesaid judgment is based on a decision of the Hon'ble Supreme Court referred therein and hence it will be in the interest of justice to pass a similar order."

Learned advocate Mr. Brahmbhatt has relied upon the decision of this court in case of Shri Brijesh Chanderlal Yadav versus GSRTC, Ahmedabad & Anr. in special civil application no. 145 of 1995 decided by this Court (Coram : M.R. Calls,J.) on 10.10.1995 wherein similar situation has been examined by this court and has observed as under:

" The matter was heard at some length. It

> is the admitted case of the corporation that the present petitioner was selected for appointment to the post of driver on 20.19.1989 and he was discharging the duties as driver in the corporation and it is after a period of nearly five years that he was for the first time subjected to medical examination in August, 1994 whereat he has been found to be unfit on account of the sight. The settlement dated 24.2.1971 Annexure "D" with the petition to which my attention has been invited by the learned Counsel for the petitioner, shows that in case the employee suffers from any handicap or becomes physically unfit while rendering services to the corporation, he has to be provided alternative employment. Mr. Lakhani appearing for the corporation has submitted that this settlement applies in such cases only when the employee is subjected to medical examination during the course of his employment but here is a case in which the petitioner has been found to be unfit at the first medical examination by the civil surgeon. The matter of substance is that alternative employment is to be provided if the handicap is suffered while rendering services of the Corporation. Merely because in the facts of present case, the petitioner was subjected to the medical examination before the Civil Surgeon in August, 1994 while he had already rendered services for a period of nearly five years, it cannot be said that it is a case of first medical examination at the time of entry into service. May be that the petitioner has suffered this handicap in his sight while discharging the duties as a driver in the Corporation and, therefore, he is entitled to the protection of the alternative employment and the corporation cannot wriggle out of granting this alternative employment to the petitioner on the pretext that the medical examination, to which the petitioner was subjected in August, 1994, was the first medical examination. If the corporation has subjected him to medical examination after five years, the corporation has to thank himself and the petitioner cannot be made to suffer. "

Therefore, in view of the observations made by the apex court as well as this court and also in view of the terms of settlement dated 26th February, 1971 Schedule-II Item-2, thereof and also considering the fact that the petitioner driver has rendered the service of

about ten years before he has been declared unfit, it was not the first medical examination but prior to that, on two occasions, he has been medically examined by the board and was found fit though it was temporary but it makes no difference when he has been declared fit by the medical board on two occasions and therefore, that cannot be considered to be the first medical examination after about eight to nine years of service rendered by the petitioner and, therefore, such termination on that ground is totally illegal, arbitrary and is required to be quashed and set aside.

When the order of termination is held to be illegal and liable to be quashed and set aside for the reasons recorded above, the question of back wages for intervening would come. It is necessary that the petitioner was working as a driver in the corporation which is a public body and the matter has remained pending before this Court for a period of about six years or so. Therefore, taking into account the post of the petitioner and also considering that the corporation is a public body and pendency of the matter before this court, it is certain that the driver would not remain without work and would certainly be getting some work on piecemeal basis and, therefore, keeping these facts and circumstances of the case in view, according to my opinion, it would be just and proper not to award full back wages for the intervening period but to award only 50 per cent of the back wages for the intervening period.

For the reasons recorded above, order of termination of services of the petitioner dated 13th March, 1996 passed by the respondent Corporation is hereby quashed and set aside with a direction to the respondent corporation to reinstate the petitioner with continuity of service on any other alternative suitable post, with 50 per cent of the back wages for the intervening period and to protect his last drawn salary. The respondent corporation is directed to implement this order within two months from the date of receipt of copy of this order. Rule is made absolute in terms indicated hereinabove with no order as to costs.

3.4.2002. (H.K. Rathod,J.)

Vyas